STATE OF MICHIGAN

COURT OF APPEALS

TRINITY HEALTH-MICHIGAN, f/k/a MERCY HEALTH SYSTEMS, Plaintiff-Appellant,	UNPUBLISHED August 21, 2003
V	No. 237962 Oakland Circuit Court
SAMUEL SCHULTZ II, Defendant-Appellee.	LC No. 00-0027749-CK

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Defendant was employed by plaintiff as the Vice President and Chief Information Officer of plaintiff's information systems division. Defendant's employment contract provided that he could be terminated without cause at any time. Further, pursuant to plaintiff's policies, a discharged executive could not receive severance pay if he failed to substantially perform the duties reasonably assigned, or if he engaged in gross negligence, fraud or dishonesty or violated a significant policy of plaintiff. Plaintiff terminated defendant's employment and refused to pay him severance claiming that there existed just cause for his termination. Defendant then filed a breach of contract action against plaintiff in which he sought severance pay. Plaintiff asserted as an affirmative defense that defendant was not entitled to severance pay because defendant had engaged in fraudulent or dishonest activities constituting a conflict of interest, in particular, violating plaintiff's policies by engaging in improper activities with respect to The Epsilon Group, a consulting group that performed contracted services on behalf of plaintiff.[1]

[1] Plaintiff's assertion that its affirmative defenses in the breach of contract action were limited to the assertion of resume fraud are not supported by the text of affirmative defenses 7 and 9, which claim in part that defendant engaged in actions that were conflicts of interest and/or not in the best interests of the plaintiff.

Defendant's breach of contract case proceeded to a jury trial. In a special verdict form, the jury found that defendant was not entitled to severance pay because he had breached the employment agreement by engaging in misconduct or wrongdoing constituting just cause for his termination. Thereafter, the trial court entered a judgment of no cause of action.

While defendant's suit for breach of contract was pending, plaintiff filed the instant suit alleging fraud, conversion and breach of duties against defendant. The facts underlying plaintiff's allegations in this case are the same facts underlying the affirmative defenses pleaded by plaintiff in response to defendant's breach of contract action, in particular the assertion that defendant's relationship with The Epsilon Group was not in the best interests of plaintiff. After the trial court entered a judgment of no cause of action in favor of plaintiff in the first action, defendant moved for summary disposition pursuant to MCR2.116(C)(7) in the present case, asserting that this case was barred by res judicata and/or collateral estoppel. The trial court granted defendant's motion, concluding that res judicata barred plaintiff's claims and that MCR 2.203 had required plaintiff to bring its claims for fraud, conversion and breach of duties as counterclaims in the prior action.

We review the grant of a motion for summary disposition de novo. *Ditmore v Michalik*, 244 Mich App 569, 574; 625 NW2d 462 (2001), citing *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). In considering a motion under MCR 2.116(C)(7), "the court may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party." *Alcona Co v Wolverine Environmental Production Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). Further, the applicability of the doctrine of res judicata and collateral estoppel are questions of law that we review de novo on appeal. *Ditmore*, *supra*, at 574, citing *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999); *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996).

Plaintiff first argues that res judicata did not bar its subsequent claims against defendant. We disagree.

> "Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical. A second action is barred when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies. Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Selwell v Clean Cut Mgmt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001), quoting *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999).

The fact that parties reversed roles in a subsequent suit does not necessarily prevent the application of res judicata. See *Ternes Steel Co v Ladney*, 364 Mich 614, 619; 111 NW2d 859 (1961); *Leslie v Mollica*, 236 Mich 610, 617; 211 NW 267 (1926); *Sprague v Buhagiar*, 213 Mich App 310, 312-313; 539 NW2d 587 (1995); *Borland v C D Barnes Associates, Inc*, 126 Mich App 569, 582; 337 NW2d 581 (1983); *City of Detroit v Nortown Theatre, Inc*, 116 Mich App 386, 393; 323 NW2d 411 (1982); *Sahn v Estate of Brisson*, 43 Mich App 666, 671; 204 NW2d 692 (1972). Thus, despite the fact that plaintiff was defending against the first suit, if all

elements are established, res judicata may act to bar the present action against defendant. We conclude that the trial court correctly determined that res judicata applies to bar this case, as all elements of res judicata have been established.

The first action between the parties, defendant's breach of contract claim, was tried by a jury and the jury found in favor of plaintiff. Thereafter, the court entered a judgment of no cause of action. Therefore, the first action was decided on the merits. Additionally, there is no dispute that both this action and the prior action involve the identical parties. Accordingly, the first two elements are clearly established. *Sewell, supra* at 575.

The third element, that the matter contested in the second action must have been or could have been resolved in the first action, is also established here. *Id*. "Res judicata bars relitigation of claims that are based on the same transaction or events as a prior suit." *Ditmore, supra* at 577, citing *Pierson, supra*, at 380; *Huggett v DNR*, 232 Mich App 188, 197-198; 590 NW2d 747 (1998); 1 Restatement Judgments, 2d § 24, p 196. "The test for determining whether two claims are identical for res judicata purposes is whether the same facts or evidence are essential to the maintenance of the two claims." *Huggett, supra* at 197-198. "If the same facts or evidence would sustain both, the two actions are the same for purposes of res judicata." *In re Koernke Estate*, 169 Mich App 397, 399; 425 NW2d 795 (1988). In contrast, if different facts or proofs are required, res judicata dos not apply. *VanDeventer v Michigan Nat'l Bank*, 172 Mich App 456, 464; 432 NW2d 338 (1988). "Whether a factual grouping constitutes a 'transaction' for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit . . .." *Adair v State of Michigan*, 250 Mich App 691, 704-705; 651 NW2d 393 (2002), quoting 46 Am Jur 2d Judgments, § 533, p 801.

We find that plaintiff's breach of duties, fraud and conversion claims could have been resolved in the first suit. *Selwell, supra* at 575. Plaintiff's defenses in the first suit and it's claims in the present suit arise from the same operative facts, i.e., defendant's misconduct, particularly with regard to The Epsilon Group. Plaintiff's reliance upon certain facts in defense of the prior action bars its efforts to seek affirmative relief based on these same facts in this subsequently filed action. *Ternes, supra* at 619; *In re Koernke, supra*, at 399 ("The test to be applied to determine if the subject matter of a second action is the same as that in a prior action is whether the facts are identical in both actions, or whether the same evidence would sustain both actions."). Once plaintiff raised these issues as defenses in the first suit, they were required to be fully and finally determined in that suit. *Ternes, supra*, at 619. Our result is consistent with the broad application of the principle of res judicata that the Michigan Supreme Court has adopted as well as the polices of finality and judicial economy because both cases involved the same factual questions. *Gose v Monroe Auto Equipment*, 409 Mich 147, 160-163; 294 NW2d 165 (1980); *Pierson, supra*, at 377-380; *Jones v State Farm Mutual Auto Ins Co*, 202 Mich App 393,401; 509 NW2d 829 (1993).[2]

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[2] Moreover, plaintiff voluntarily chose not to seek to amend its answer to include its counterclaims and instead opted to file an independent suit. Had plaintiff exercised reasonable

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Accordingly, we find that res judicata bars plaintiff from relitigating its claims. Therefore the trial court did not err in summarily dismissing plaintiff's later action under MCR 2.116(C)(7).

Plaintiff also claims that defendant is precluded from raising res judicata under the doctrine of laches. As the trial court declined to address this issue, it was not properly preserved for our review and we decline to address it. Furthermore, plaintiff did not cite any case law in its brief on appeal to support its contention that the doctrine of laches precluded defendant from raising the doctrine res judicata as a defense to this action. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Given our resolution of the above two issues, we need not address the remaining issues raised by plaintiff on appeal.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

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diligence, it could have raised its fraud, conversion and breach of duty claims as counterclaims to the first action. *Selwell, supra* at 575.